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FAX

Date: July 19, 2007
To: Examiner Benjamin Huh
Group Art Unit: 3767
Re: U.S. Application No. 10/089,831 filed April 4, 2002
National Phase of PCT/US00/27048
Ref: BET-105 (Fresenius Ref: K02/01)

Dear Examiner Huh:

Thank you for taking the time to discuss the above case with me earlier today and for agreeing to conduct a more detailed telephone interview next week to explore the various issues raised in the April 11, 2007 Office Action.

As you requested, the following is a list of the topics I would hope that we could cover during next week's telephone interview:

(1) The §103 Rejection based on Peabody and Hagen

As I mentioned, the Peabody/Hagen §103 rejection was first made against independent Claim 12 and its dependent claims in the first Office Action for this application dated October 4, 2004. Applicants responded to this rejection in their Amendment filed on January 6, 2005, but the rejection was repeated in the second Office Action dated March 22, 2005 along with the suggestion from the Examiner that "Applicant should more clearly recite what he means by "continuously flowing" in the claim [Claim 12]."

In accordance with that suggestion, applicants submitted a definition of the word "continuous" from Webster's New World Dictionary and supporting argument in their Amendment filed on June 27, 2005. On September 23, 2005, the Peabody/Hagen §103 rejection of Claim 12 and its dependent claims was withdrawn. The Examiner's Reasons for Allowance stated that "a method and apparatus for controlling continuous dialysis fluid flow through a patient's peritoneal cavity using volume determined by bioimpedance measurements directed at the peritoneal cavity is not found nor fairly taught in the prior art of record, as argued by applicant and agreed by examiner." (emphasis added)

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Exhibit A

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Based on this history, we had believed that the Peabody/Hagen §103 rejection had been resolved in 2005 and thus were surprised to find the same rejection again being made in the April 11, 2007 Office Action.

(2) The §101/§112 Issues

As I mentioned, we believe that determining a number which has a biological significance, such as the volume of fluid in a subject's peritoneal cavity, satisfies §101 and §112.

As I indicated, the archetypical example of such a number is heart rate. Heart rate in and of itself is a useful, concrete, and tangible result. Although not as famous as heart rate, the volume of fluid in a subject's peritoneal cavity is in and of itself a useful, concrete, and tangible result. Certainly, the right to obtain patent protection on a method or apparatus for determining the value of a biological parameter cannot depend on whether the parameter is famous or not. Accordingly, unless the Patent Office plans to stop issuing patents on methods and apparatus for determining heart rate, which would hardly make sense, the claims of this application should be allowed.

(3) Claim Objection Re Claim 12

The April 11, 2007 Office Action states that Step B of Claim 12 can be read in two ways and suggests that applicants change the word order of that step. We would appreciate some further insight into how Step B is being read and why the change in word order will help.

In terms of a time for next week's telephone interview, except for Monday afternoon, I am in my office all week. I look forward to our further conversation and appreciate your help with this case.

Regards,

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Registration No. 30,399

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